APPENDIX A

Memorandum of District Court for the Northern District of Ohio, Eastern Division, on Motion To Dismiss Indictment.

(Filed December 20, 1963)

Criminal No. 23652

UNITED STATES OF AMERICA

v.

VALMORE J. FORGETT, JR.

KALBFLEISCH, J.

Defendant was indicted on March 22, 1961, for violating Section 5855 of Title 26, U. S. C. A. On December 4, 1961, he entered a plea of guilty. On September 20, 1962, Judge McNance of this Court, who had accepted his plea of guilty and who had imposed sentence, permitted defendant to withdraw his guilty plea and ordered the sentence vacated and set aside. Thereafter defendant filed a motion to dismiss the indictment on the basis that the section under which he was charged violated his rights against self-incrimination under the Fifth Amendment of the United States Constitution.

Section 5855 provides that it is unlawful for anyone who is required to register a firearm pursuant to Section 5841 of Title 26, U. S. C. A., and who has not so registered, to ship, carry or deliver any firearm in interstate commerce. That section is a prohibition against certain classes of persons' engaging in interstate firearms shipments; that is, it forbids any persons who possesses any firearm in violation of Section 5841 from engaging in interstate shipments of any type of firearm, and it makes no difference whether the firearms which are to be shipped are registered or unregistered.

Section 5841 requires that all persons possessing firearms shall register them, and then excepts from registra-

tion certain firearms which have been previously properly registered.

Section 5851 of Title 26, U.S.C.A., provides that it is unlawful for anyone to possess a firearm which is required to be registered pursuant to Section 5841 if it has not been so registered.

The Ninth Circuit Court of Appeals held in *Russell* v. *United States,* 306 F. 2d 402, that Section 5841 unconstitutionally required a person to incriminate himself because when it was combined with Section 5851 it required that every person who was guilty of possessing a firearm in violation of Section 5851 must come forward and identify himself by registering that firearm. The *Russell* case was followed explicitly by the District Court of Colorado in *McCann* v. *United States,* 217 F. Supp. 751 (1963), and implicitly in *United States* v. *Mares,* 208 F. Supp. 550 (1962), affirmed by the Tenth Circuit at 319 F. 2d 71 (1963).

Defendant herein contends that a conviction under Section 5855 would likewise be in violation of his Fifth Amendment rights because he is charged with engaging in interstate commerce in firearms at a time when he possessed unregistered firearms. It should be noted that Section 5855 also precludes from participating in interstate commerce in firearms such persons as are in violation of certain other sections of the National Firearms Act. However, defendant's guilt, if it be ascertained, could only, under the facts as charged, be premised upon his failure to register pursuant to Section 5841.

The same Court which decided the *Russell* case subsequently held that the unconstitutionality of Section 5841 did not preclude a conviction under Section 5851, although the forbidden action charged under Section 5851 was the possession of a firearm which had not been registered as required by Section 5841. *Frye* v. *United States,* 315 F. 2d 491 (1963), certiorari denied 375 U. S. 849. Judge Hamley,

who wrote the *Russell* opinion, was a member of the Court which decided the *Frye* case. The Ninth Circuit reiterated the identical view in *Starke* v. *United States,* 316 F. 2d 45 (1963). The same conclusion was reached by the District Court of California in *Hazelwood* v. *United States,* 208 F. Supp. 622 (1962). The reasoning of these later cases distinguishes the *Russell* case by saying that the charge under Section 5851 was the possession of an unregistered firearm, not the failure to register, and therefore that the unconstitutionality of Section 5841 does not preclude the use of Section 5841 as a basis for a 5851 conviction. This same view was apparently approved in *Sipes* v. *United States,* 321 F. 2d 174 (8th Cir., 1963), certiorari denied 375 U. S. 913.

It therefore follows that, assuming that Section 5841 is unconstitutional, as the opinions in the *Frye, Starke* and *Sipe* cases did, if Section 5841 may nevertheless be used as a basis for a Section 5851 conviction there appears to be no reason why it may not be used as the basis for a Section 5855 conviction.

The defendant's motion to dismiss the indictment will be denied, with leave, however, for defendant to reassert the motion at the time of trial.

/s/ GIRARD E. KALBFLEISCH
United States District Judge

APPENDIX B

No. 16021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

VALMORE J. FORGETT, JR., *Defendant-Appellant.*

On Appeal From the District Court of the United States for the Northern District of Ohio, Eastern Division.

Decided August 26, 1965.

Before: WEICK, Chief Judge, MILLER, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

WEICK, Chief Judge. Appellant Forgett was indicted for unlawfully shipping in interstate commerce fifty-two firearms without having them registered with the Secretary of the Treasury or his delegate, as required by Section 5841[1] of Title 26, U.S.C., in violation of Section 5855[2]. He entered a plea of guilty to the charge. Thereafter he was granted leave to withdraw his plea of guilty, and filed a motion to dismiss the indictment on the ground that Section 5841 was unconstitutional, in violation of his rights

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[1] Sec. 5841, Title 26, U.S.C., provides:

"Every person possessing a firearm shall register with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof . . ."

[2] Sec. 5855, Title 26, U.S.C. provides:

"It shall be unlawful for any person who is required to register as provided in section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce."

against self incrimination under the Fifth Amendment to the Constitution. The motion to dismiss was denied by the District Court in a memorandum opinion. Forgett was then tried and convicted by a jury. He was fined $2,000. and placed on probation for three years.

Forgett was a licensed dealer in firearms. He made arrangements with a trucking company to ship the firearms by tractor-trailer from Oconomowoc, Wisconsin, (where he had purchased them about two weeks previously from another licensed dealer), to Jersey City, New Jersey. No bill of lading was issued for the shipment. There were fifty or more automatic weapons of different makes and types, including foreign machine guns, machine pistols, American automatic weapons such as 50-calibre machine guns and a quad 50 anti-aircraft automatic weapon.

The tractor-trailer was loaded with weapons and left Oconomowoc for Cleveland on a Saturday evening. Upon arrival in Cleveland the truck driver was stopped by police because the tractor-trailer outfit was overloaded. The police asked to see the load because the driver had no bill of lading. When the police discovered the weapons, they arrested the truck driver and had the tractor-trailer moved to the Ravenna arsenal. A supervisor with the Alcohol and Tobacco Tax Division of the Internal Revenue Service who had over twenty-one years' experience in enforcing the National Firearms Act, went to the Arsenal to inspect and examine the firearms. He made an inventory of the weapons which included their make, calibre and serial numbers. The list was then typed and sent to the Treasury Department in Washington for a registration check. That Department issued its Certificate to the effect that the weapons had not been registered. The Certificate was received in evidence.

A member of the Ohio National Guard test filed about thirty-six of the automatic weapons. He reported that four Browning 50 calibre machine guns, which had not

been registered, were in operating condition. He also reported on several other firearms in operating condition and as to some which required the addition of a part.

The principal point raised by Forgett in his appeal was that Section 5841 violated the Fifth Amendment to the Constitution by compelling every person possessing a firearm, as defined by Title 26, Section 5848, to give evidence against himself admitting violation of one or more sections of Chapter 53, for which there is a criminal penalty. He relied heavily on *Russell* v. *United States*, 306 F.2d 402 (C.A. 9, 1962).

The constitutionality of the National Firearms Act as a taxing measure was upheld by the Supreme Court in *Sonzinsky* v. *United States*, 300 U.S. 506 (1937). Later the Act was held not to be in violation of the Second Amendment to the Constitution in *United States* v. *Miller*, 307 U.S. 174 (1939). See also *United States* v. *Decker*, 292 F. 2d 89 (C.A. 6, 1961).

Although there was some confusion in *Russell* as to the nature of the offense charged in the information, the Court determined that the offense was failure to register the firearms, in violation of Section 5841. The Court reasoned that the act of registration was self-incriminating because under the presumption clause contained in the second sentence of Section 5851[3], proof of possession establishes *prima facie* a violation of that Section. *Id.* 411.

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[3] Sec. 5851, Title 26, U.S.C. provides:

"It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."

We do not so read Section 5851. The second sentence referred to specifically states ". . . possession of such firearm". This refers to a firearm transferred in violation of any of the six sections mentioned in the first sentence, or to a firearm which has not been registered as required by Section 5841.

In order to obtain a conviction for violation of Section 5851, the Government would be required to show something more than mere possession of the firearms. The statutory presumption alone would not be sufficient to make out a *prima facie* case. It would be necessary to prove that the firearms had been transferred in violation of one or more of the enumerated sections, or had not been registered. *Waters* v. *United States,* 328 F.2d 739 (C.A. 10, 1964); *Sipes* v. *United States,* 321 F.2d 174 (C.A. 8, 1963).

A similar presumption clause was considered by the Supreme Court in the recent case of *United States* v. *Gainey,* 380 U.S. 63 (1965), and was held not to deprive the trial judge of his normal powers with respect to submitting the case to the jury or granting a judgment notwithstanding the verdict. The presumption provided by the statute was merely a rule of evidence and was not conclusive. It did not prevent the jury from being properly instructed on the standard for reasonable doubt.

The Ninth Circuit subsequently distinguished *Russell* in *Frye* v. *United States,* 315 F. 2d 491 (C.A. 9, 1963) cert. denied 375 U.S. 491 and *Starks* v. *United States,* 316 F.2d 45 (C.A. 9, 1963), on the ground that *Russell* involved only a charge of failure to register firearms in violation of Section 5841, whereas in *Frye* and *Starks* the offense was possession of an unregistered firearm in violation of Section 5851. *Frye* and *Starks* were followed by the Eighth Circuit in *Sipes* v. *United States,* 321 F. 2d 174 (C.A. 8, 1963).

In the case at bar the gist of the offense was the unlawful shipment of unregistered firearms in interstate commerce. Forgett's failure to register the firearms would not have authorized conviction under Section 5855, if he had not made the shipment in interstate commerce. The reasoning in *Frye, Starks* and *Sipes* justifying the convictions for possession of unregistered firearms, applies with equal force here to a Section 5855 violation.

Nor do we understand that registration of the firearms by Forgett would have required him to admit criminality. Between the dates of purchase and shipment Forgett could have registered the firearms and the interstate shipment would then have been lawful. If it developed in connection with the registration that criminality might attach upon completion of his purchase this would have furnished him with adequate ground for not going through with the deal. If the registration form contained questions, the answers to which he believed might tend to incriminate him, he could claim his privilege on the registration form. Cf. *United States* v. *Sullivan*, 274 U.S. 259 (1927).

In our opinion the evidence was sufficient to support the judgment of conviction.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16,021

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

VALMORE J. FORGETT, JR., *Defendant-Appellant.*

Before: WEICK, Chief Judge, MILLER, Circuit Judge, and McALLISTER, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

CARL W. REUSS
Clerk

Filed Aug 26 1965 Carl W. Reuss, Clerk